

FILED

OCT 10 2018

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA**

In re:) Case No. 18-23887-B-13
TIMOTHY LEROY NEHER,) DC No. JRD-1
Debtor(s).)

MEMORANDUM AND ORDER DISMISSING CASE WITH PREJUDICE

Introduction

The court has before it a motion to dismiss this Chapter 13 case with prejudice pursuant to 11 U.S.C. §§ 349(a) and 1307(c) filed by LendingHome Funding Corporation. Docket 90. Debtor Timothy L. Neher has opposed the motion. Docket 139. The motion was heard on October 9, 2018. Appearances were noted on the record.

This memorandum and order constitutes the court's findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a) applicable by Federal Rules of Bankruptcy Procedure 7052 and 9014(c). For the reasons explained below, LendingHome's motion to dismiss will be granted and this Chapter 13 case will be dismissed with prejudice with the "with prejudice" dismissal being a one (1) year bar to debtor's refiling of any single or joint bankruptcy case under any chapter of the Bankruptcy Code.

Background

This is the debtor's third Chapter 13 case filed within the span of eighteen months. The debtor's first Chapter 13 case was

1 filed on April 17, 2017, and dismissed on May 5, 2017, for
2 failure to timely file documents. Case No. 17-22519. The
3 debtor's second Chapter 13 case was filed on May 8, 2017, and
4 dismissed on June 20, 2018, when the debtor was unable to confirm
5 a plan after six attempts.¹ Case No. 17-23129. The debtor
6 states that he decided to file this third Chapter 13 case on June
7 18, 2018, when he learned his prior Chapter 13 case would be
8 dismissed based on his inability to confirm a plan. Docket 139
9 at ¶ 2.a.

10 The debtor filed the petition that commenced this third
11 Chapter 13 on the same day that the order dismissing his second
12 Chapter 13 case was filed, i.e., June 20, 2018. More precisely,
13 the petition that commenced this Chapter 13 case was filed at
14 2:35 p.m. on June 20, 2018, and the order dismissing the debtor's
15 prior Chapter 13 case was filed at 9:17 a.m. on June 20, 2018.
16 Compare Docket 1, Case No. 18-23887, with Docket 338, Case No.
17 17-23129.

18 With the petition that commenced this Chapter 13 case the
19 debtor also filed a plan nearly identical to the plan that the
20 court in the prior Chapter 13 case determined was not feasible
21 and therefore unconfirmable. Compare, Case No. 18-23887, Docket
22 16, with Case No. 17-23129, Docket 295. Due to the absence of
23 clear and convincing evidence of changed circumstances in the
24 five-hour span between the dismissal of the debtor's prior

25
26 ¹The court concluded that the plan was not feasible because,
27 in large part, of the debtor's inability to perform its terms and
28 its proposal to sell the debtor's real property to a family
member without evidence such a sale was likely. Case No.
17-23129, Dockets 331 & 338.

1 Chapter 13 case and the filing of this one, Dockets 52-54, this
2 court expressed feasibility concerns similar to those the court
3 in the debtor's prior 13 case expressed and likewise denied
4 confirmation of the debtor's plan on September 20, 2018. See
5 Dockets 121, 124, 131.

6 During the course of this case the court also noted an
7 apparent manipulation of the schedules. When compared to amended
8 schedules the debtor filed in his prior Chapter 13 case on June
9 15, 2018, just five days before the petition that commenced this
10 case was filed on June 20, 2018, unsecured debts in Schedule E/F
11 filed in this case are substantially lower. The former schedules
12 list unsecured debt totaling \$144,298.66 whereas the latter
13 schedules list unsecured debt of \$117,451.75. Compare Case No.
14 17-23129, Docket 324, with Case No. 18-23887, Docket 14. The
15 debtor states he eliminated unsecured debts from the schedules
16 filed in this case after creditors did not respond to a request
17 to confirm their creditor status. Inasmuch as Schedule E/F
18 clearly reflects that the debtor understands he can list
19 unsecured debts as "disputed," Docket 14, the debtor's
20 explanation is dubious at best.

21 It is also apparent that the debtor has used the bankruptcy
22 process in general, and this Chapter 13 case in particular, to
23 hinder, delay, and defraud LendingHome by preventing it from
24 foreclosing on its real property collateral in furtherance of
25 what the debtor describes as a "lifelong vendetta" against
26 LendingHome which the debtor also states he intends to pursue
27 "for the rest of [his] life" because he is "not going away,
28 ever[.]" Docket 93 at Ex. 9. That vendetta entails endless

1 litigation in state and bankruptcy courts.² Docket 92 at ¶¶ 2-5,
2 8-15; Docket 93 at Ex. 6, 7, & 8. At one point, the debtor told
3 LendingHome's attorney that he would file bankruptcy in order to
4 obtain relief denied him in another forum. Docket 93 at Ex. 6.

5 In furtherance of the debtor's self-described vendetta
6 against LendingHome, after the court denied the debtor's motion
7 to extend the automatic stay on August 9, 2018, Dockets 18 & 52-
8 54, the debtor made two requests for injunctive relief in an
9 effort to stop LendingHome's foreclosure: one request was
10 improper and the other request was highly suspicious.

11 The debtor's first request for injunctive relief was
12 improper. It was denied because the debtor did not request
13 injunctive relief in an adversary proceeding.³ Docket 106.

14 The debtor's second request for injunctive relief was nearly
15 identical to his first, except with a twist. With the second
16 request the debtor included as an exhibit a purported notice of
17 appeal from the August 9, 2018, order denying the motion to
18 extend the automatic stay. Docket 141 at Ex. A. When that
19 purported notice of appeal was filed as an exhibit on September
20 25, 2018, that was the first time it appeared in the case.

21 The notice of appeal the debtor filed as an exhibit on
22

23 ²Although LendingHome's attorney advised the court during
24 the October 9, 2018, hearing that LendingHome managed to
25 foreclose on its real property collateral on September 26, 2018,
as the debtor states, his vendetta will continue long thereafter.
Docket 93 at Ex. 9.

26 ³After the court denied that request the debtor managed to
27 return to state court where he obtained a temporary stay of the
28 foreclosure. Docket 121.

1 September 25, 2018, was not on the docket, the clerk's office had
2 no record of it ever being received or filed, it was not among
3 other documents the debtor also filed on September 25, 2018, and
4 the file stamp on the exhibit appeared suspect to the clerk's
5 office. Docket 156. The debtor also did not mention any notice
6 of appeal in his first request for injunctive relief filed two
7 weeks earlier on September 10, 2018. Dockets 100, 156.

8 LendingHome had also pointed out in an earlier opposition filed
9 on September 4, 2018, that the "Debtor did not appeal the Court's
10 order denying Debtor's Motion to Extend the Automatic Stay in the
11 Current Case (Docket No. 52)." Docket 84 at 3:21-23. The debtor
12 filed a reply to that opposition on September 11, 2018, and the
13 reply made no mention of any pending appeal. Docket 109. And
14 twice in the course of proceedings after the August 9, 2018,
15 order was entered the court explicitly stated on the record, in
16 open court, in the debtor's presence, and without any response
17 from the debtor that the debtor did not appeal the August 9,
18 2018, order. Docket 53.

19
20 **Discussion**

21 A Chapter 13 petition filed in bad faith may be dismissed
22 for cause under § 1307(c). Eisen v. Curry (In re Eisen), 14 F.3d
23 469, 470 (9th Cir. 1994)); Leavitt v. Soto (In re Leavitt), 171
24 F.3d 1219, 1224 (9th Cir. 1999) (citation omitted). Bad faith is
25 determined based on a consideration of a totality of the
26 circumstances. Leavitt, 171 F.3d at 1224. The totality of the
27 circumstances includes factors leading up to the filing of a
28 petition. See Matter of Little Creek Develop. Co., 779 F.2d

1 1068, 1072 (5th Cir. 1986).

2 Although the general presumption under § 349(a) is that
3 dismissal is without prejudice, meaning the debtor can refile,
4 § 349(a) also permits the court to dismiss with prejudice, which
5 is a bar to refiling. Franco v. U.S. Trustee (In re Franco),
6 2016 WL 3227154, *5 (9th Cir. BAP 2016) (citing Leavitt, 171 F.3d
7 at 1223-24). A finding of bad faith permits a dismissal with
8 prejudice. Id. (citing Leavitt, 171 F.3d at 1224). And inasmuch
9 as a dismissal with prejudice is a permanent bar to refiling a
10 bankruptcy case, then dismissal with prejudice for bad faith may
11 also include a lesser bar to refiling. Id. (citing Johnson v.
12 Vetter (In re Johnson), 2014 WL 2808977, *7 (9th Cir. BAP 2014)).
13 "When dismissing with prejudice courts are to consider the
14 following factors: (1) whether debtor misrepresented facts in the
15 petition, unfairly manipulated the Bankruptcy Code, or otherwise
16 filed in an inequitable manner; (2) debtor's history of filing
17 and dismissals; (3) whether debtor only intended to defeat state
18 court litigation; and (4) whether egregious behavior is present."
19 Id. (citing Leavitt, 171 F.3d at 1224).

20 Filing the petition that commenced this third Chapter 13
21 case several hours after the debtor's second Chapter 13 case was
22 dismissed, and then filing a plan in this Chapter 13 case nearly
23 identical to the one determined in the prior Chapter 13 case to
24 be not feasible and therefore unconfirmable, without clear and
25 convincing evidence of changed circumstances in the five-hour
26 period between the two cases is a manipulation of the Bankruptcy
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28

1 Code and the filing of a petition in an inequitable manner.⁴
2 Manipulating the schedules to reflect a dubious reduction in
3 unsecured debt and signing and filing those manipulated schedules
4 under penalty of perjury is similarly a manipulation of the
5 Bankruptcy Code and filing of a petition in an inequitable
6 manner. Filing three Chapter 13 petitions followed by improper
7 and suspicious requests for injunctive relief in an effort to
8 hinder, delay, or defraud LendingHome by using the bankruptcy
9 court to continue litigation in anticipation of relief denied in
10 another forum - all in pursuit of a personal vendetta - is a
11 manipulation of the Bankruptcy Code, the filing of bankruptcy
12 petitions for an improper purpose and in an inequitable manner,
13 and egregious conduct. And inasmuch as the court has previously
14 determined that the debtor did not produce clear and convincing
15 evidence of changed circumstances during the five-hour period
16 between the dismissal of his prior Chapter 13 case and the filing
17 of this one, the presumption that this Chapter 13 case was not
18 filed in good faith has also not been rebutted.

19 In short, the debtor has engaged in bad faith conduct which
20 is cause sufficient to warrant dismissal of this Chapter 13 case
21 with prejudice. Moreover, based on the debtor's use of the
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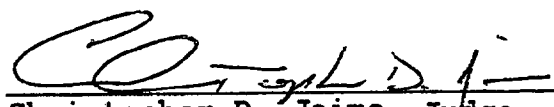
23 ⁴The court rejects the debtor's argument that the relevant
24 period for demonstrating changed circumstances is the period
25 between the time he learned his prior case would be dismissed and
26 this one was filed. Regardless of what a judge may state during
27 a hearing, the written order controls. Playmakers LLC v. ESPN,
28 Inc., 376 F.3d 894, 896 (9th Cir. 2004). Therefore, the relevant
time period for demonstrating changed circumstances by clear and
convincing evidence is the five-hour period between the entry of
the order dismissing the debtor's prior case and the filing of
the petition that commenced this one.

1 bankruptcy process to single out and target a creditor with whom
2 the debtor has engaged in significant litigation in furtherance
3 of a self-described vendetta, the court is persuaded that the
4 debtor will continue to misuse and abuse the bankruptcy process
5 and the bankruptcy courts for the same and similar purpose if the
6 debtor is allowed to immediately refile another bankruptcy case
7 upon the dismissal or conversion of this one. A dismissal of
8 this Chapter 13 case with prejudice is warranted and in the best
9 interest of creditors and the estate. Therefore, for all the
10 foregoing reasons,

11 IT IS ORDERED that LendingHome's motion to dismiss is
12 **GRANTED** and this Chapter 13 case is **DISMISSED WITH PREJUDICE**.

13 IT IS FURTHER ORDERED that the debtor is **BARRED** from filing
14 a single or joint bankruptcy case under any chapter of the
15 Bankruptcy Code for a period of one (1) year from the entry of
16 this order.

17 **Dated:** October 10, 2018

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21 Christopher D. Jaime, Judge
22 United States Bankruptcy Court
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2 **INSTRUCTIONS TO CLERK OF COURT**
3 **SERVICE LIST**

4 The Clerk of Court is instructed to send the attached
5 document, via the BNC, to the following parties:

6 Timothy Leroy Neher
7 288 Lower Gulch Rd
8 Oroville CA 95965

9 Jan P. Johnson
10 PO Box 1708
11 Sacramento CA 95812

12 Jonathan R. Doolittle
13 101 2nd St #1800
14 San Francisco CA 94105
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